REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	(	Grievant: Class Action
	)	
Between	(	xxx
	(	
xxx	(	xxx
	)	
And	(	xxx
	(	
xxx	(	
xxx	)	

BEFORE: Ed Escamilla, Arbitrator

APPEARANCES:

xxx

xxx

Place of Hearing:	Bremerton, Washington
Date of Hearing:	January 23, 2002
Relevant Contract Provision:	Article 5, ELM 5, Section 432.33
Contract Year:	1998-2000
Type Grievance:	Contract

Award Summary

The grievance is sustained. The Xxx unilaterally changed the employees' past practice of skipping their lunch breaks which had existed for approximately 9 years.

_____

Ed Escamilla January 31, 2002
Arbitrator

OPINION AND AWARD

The facts of this case are fairly straightforward. Based on the testimony of the parties' witnesses and written statements by relevant supervisors, I conclude that a past practice at the xxx existed as alleged by the Union. The past practice allowed employees on tour 3 to work through their shifts without taking a lunch break and thereby allowing the employees to leave work ½ hour earlier. The bases for my conclusion are the following facts.

The Union witnesses' testify that the practice existed since 1993. The specific practice allowed employees to work their entire shift without taking a lunch break and without obtaining specific approval by their supervisor. Although the Union introduced the clock rings for tour 3 employees in support of their position, I find that the clock rings are inconclusive to establish the existence of the past practice. However, other factors sufficiently establish the alleged past practice.

Admissions by relevant Xxx agents are conclusive on the issue of fact. In this case, a written statement by the pertinent supervisor made during the investigative process of the grievance stated that the past practice as alleged by the Union did in fact exist since March 1993. Additionally, the supervisor stated that in his opinion the past practice provided the Xxx with a more efficient manner to operate the xxx. Although the supervisor at hearing qualified his statement, I disregard the belated qualification and conclude that his previous written statement more accurately reflects the supervisor's position on this matter. Thus, I conclude that an admission against interest was established through competent evidence.

Another factor, which I rely in concluding that the past practice existed, was the testimony of all of the Xxx's managers. The previous and current xxxs testified that they

were unaware that tour 3 employees at the xxx were not taking their lunch breaks in accordance with the policies of the xxx District. They believed that the employees were taking their lunch break prior to working six hours. The xxx manager also testified in a similar fashion. Because of the absence of evidence, I infer that the National Agreement and local policies xxx do specifically deal with the issue in this case.

However, what is most revealing is that after a June 1999 function 4 audit, the current xxx discovered that employees were in fact working through their shifts without taking a lunch break. He subsequently instructed the xxx manager and supervisor to make sure that the employees were adhering to the xxxDistrict's lunch break policy. Both the xxx and the xxx station manager admitted that the supervisor was resistant in carrying out the instructions. The resistance led to a subsequent directive by the xxx. The Xxx manager stated that the xxx's instruction were finally implemented and followed only several months prior to the hearing, approximately 1 ½ years after the xxx issued his initial directive.

The supervisor testified that currently employees are not allowed to work through their shifts without taking a lunch break, unless specifically approved by the supervisor under special circumstances, for personal or operational needs. The supervisor also determines the specific time when employees take their lunch breaks.

I conclude that the xxx's reaction to the xxx situation is a tacit admission that the alleged past practice existed; the practice continued to exist even after the initial orders to change, otherwise the repeated instructions to the station manager and supervisor would have been unnecessary. The tacit admission is further evidence of the existence of the alleged past practice.

Based on the above, as well as the analysis discussed below, the Union has met its burden of establishing that the past practice regarding lunch breaks at the Xxx of tour 3 employees existed as described above.

Analysis

I have carefully considered the parties' arguments, documents in evidence, pertinent contract articles, employer handbook provision, arbitral authority and treatises. It is noteworthy that there is no allegation that the employees were not working their full eight hours per shift.

Applicable contract articles and handbook provisions

The Union's main argument relies on Article 5 which restricts the Xxx from making unilateral changes of terms and conditions of employment. Employees' schedules and lunch breaks are terms and conditions of employment subject to bargaining unless otherwise waived. The Xxx maintains that Article 3 permits the Xxx the right to make decisions regarding the operation of its facilities in an efficient manner, including the scheduling of employees. Furthermore, the Xxx relies on its handbook, ELM 15, Section 432.33 that basically states that employees will not be required to work more than six hours without being afforded a lunch break.

Arbitral authority and treatises

The parties presented an excellent array of regional arbitration awards regarding past practice. Additionally, the parties also provided the arbitrator with pertinent sections of *How Arbitration Works, Fourth Edition*, Elkouri and Elkouri, and *Arbitration and Public Policy, Proceedings of the 14th Annual Meeting National Academy of Arbitrat*ors, Chapter 2, Richard Mittenthal.

With respect to the arbitration awards, it is gleamed that the Union must establish by the preponderance of the evidence that a past practice existed, that the past practice concerned terms and conditions of employment, and that the employer unilaterally changed the past practice. The common definition of past practice in the labor relations arena is a practice which is or has become a customary and continued manner of doing

business. Arbitrators have expanded the definition of past practice by identifying certain elements. Arbitrators have held that to be binding, past practice must be "unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time as a fixed established practice, accepted by both parties." (Case W7C-5M-C28032, 1991, Arbitrator Abernathy; Case W4C-5H-C2848, 1987, Arbitrator Levak) Elkouri and Elkouri state that past practice elements include "clarity, consistency, length of time, and mutual acceptance." Both definitions are consistent with each other and provide ample guidance to determine whether a past practice existed in this case.

Arbitrator Levak, *infra*, stated,

> "Arbitral authority on the subject of 'past practice as part of the National Agreement' is well-settled: Regional Service arbitrators agree that the National Agreement Article 5 generally prohibits management from unilaterally discontinuing past practices which constitute major conditions of employment, such as rest periods."

I agree with the position of Arbitrator Levak, except that I do not adhere to his restrictions that past practice must involve major conditions of employment. Rather, I do not distinguish between major or minor working conditions in determining whether the Xxx violates Article 5, but rather rely on whether or not the past practice is considered to be a term and condition of employment. The difference is irrelevant in this case, as Arbitrator Levak concluded that rest periods are a major condition of employment. This case deals with rest periods, specifically lunch breaks.

In Case W4C-5K-C-17292, (1988), Arbitrator Snow concluded that employers indeed have the exclusive right to "determine the methods" for carrying out the mission of the enterprise. Any rule that is implemented pursuant to this authority is subject to challenge by the Union on the grounds of "reasonableness". The rule may be unreasonable because it is inherently unreasonable, administered unreasonably, violates contractual provisions, and inconsistent with established past practice.

Arbitrator Snow stated,

> "What is at issue is not the power of the employer to implement regulations but whether or not the regulations selected by management is reasonably related to is objective. If there is an insufficient rational link between a rule and its objective or the manner in which the rule has been implemented, arbitrators have not been inclined to support the rule. What an arbitrator seeks to test is whether or not there is an insufficient rational basis in the rule or its implementation which makes the action based on the rule arbitrary, capricious, or discriminatory."

In dicta, Arbitrator Snow stated, "While a decision in this case has not been premised on this aspect of the dispute, it is worthwhile to note that some arbitrators have concluded that rules were unreasonable if they were in conflict with a past practice."

Some arbitrators are concerned that past practices may forever bind management from effectively directing its workforce. In order to avoid managerial inflexibility, they reason that since management has the right to agree to a past practice, they also have the right to cease that practice as long as their actions do not violate a specific provision of the contract. I note that this concerned has been address by other arbitrators who have provided some latitude for management to cease past practice by bargaining at the appropriate time, or when a change of conditions or underlying reasons make the past practice no longer feasible. I believe that the latter approach is more appropriate when dealing with management's attempt to change past practices.

Of great importance to this case, the treatises touch on the subject of the duration of past practices. One theory suggests that a practice, which is apart from any contractual basis, is an enforceable condition of employment on the theory that the "agreement subsumes the continuance of existing conditions." If a practice "is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect." "If either side should, during negotiations of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force." (Elkouri & Elkouri, page 448) I adhere to this theory, which returns the issue to the parties to bargain at the appropriate time, and at

the same time preserves employee rights accrued through past practice until negotiated into a written agreement or terminated by failure to reach agreement.

The above principles guide me in analyzing the issue herein and reaching my conclusions.

Elements of past practice

In order for a party to establish past practice, the practice must be shown to have been universally and consistently applied for a substantial period of time and mutually agreed to by parties, explicitly or implicitly as in this case. With respect to the factor of consistent and universal application of the lunch break practice, I conclude, as discussed in the statement of facts, that the evidence is persuasive that the practice did in fact exist for tour 3 employees at the Xxx. The Xxx's argues that the alleged past practice was not universally applied because the practice only applied to one tour and to one facility in the Bremerton area. I reject this argument.

I take official notice that local negotiations have carved out specific working conditions depending on an identifiable group of employees employed in one facility. The readily and most obvious segregation of group of employees with distinct rights are those employed in different tours. The parties have often negotiated rights of employees dependent on the tour of employment. Thus, parties are free to negotiate less that facility-wide terms and conditions of employment with respect to a readily identifiable specific group of employees. I conclude that such an identifiable and specific group of employees exist in this case, i.e., tour 3 at the Xxx. To hold contrary would lead to an untenable situation of restricting local parties.

With respect to the longetivity of the instant past practice, the evidence is conclusive that the practice has existed since at least March 1993, as admitted by the tour 3 supervisor. This practice has lasted through as least two collective bargaining agreements.

Finally, I conclude that the Xxx through its tour 3 supervisor, an agent with apparent authority, agreed to the past practice as alleged by the Union. The supervisor was obviously aware that employees were skipping their lunch break and did not take any actions to cease that practice. Although the xxx and the Xxx manager may not have been aware of the practice and thus did not explicitly condone the practice, their immediate agent did in fact condoned and agreed to the practice.

Of course, there are limitations to the agency rule. An employer may not be held responsible or bound to a supervisor's conduct if that conduct is clearly outside the supervisor's scope of authority. In this case, the tour 3 supervisor is in fact the person who authorizes employees to take lunch at specific times or to skip lunch entirely. Therefore, the tour 3 supervisor acted within his vested authority in dealing with tour 3 employees lunch breaks.

Accordingly, I conclude that the parties mutually agreed to the past practice based on the supervisor's tacit approval of the practice and thus meeting this test. In conclusion, I find that the Union met its burden of proof and established a past practice, in accordance with the principles discussed above, regarding tour 3 employees skipping their lunch breaks at the Xxx.

Management's rights

Management argues that Article 3 of the contract gives management the right to scheduled employees without bargaining with the Union. I agree. It is well established that the contract's management right clause is sufficiently broad to grant management the exclusive right to operate its facilities in an efficient manner. This right includes the scheduling of employees. The scheduling of employees is accomplished in different ways.

Normally, the bid position description defines the parameters of the employees' schedules. As management pointed out, each bid position identifies the start and end of

the position's shift. Based on the evidence presented, most of the positions descriptions state the duration of the lunch period without specifically dictating the time of the lunch break. Management stated that the specific time is up to the individual supervisor depending on the facility's operational needs. It is easily discernible that Article 3 indeed bestows exclusively on management the right to schedule employees.

The record, however, does not establish that management has exercised its managerial right regarding the scheduling of lunch breaks by timely, or otherwise, issuing any policy mandating employees to take lunch breaks before working six hours or at any specified time. The Xxx incorrectly relies on its handbook to conclude that employees must take a lunch break before working six hours. It is clear that the handbook relied by the Xxx restricts management from compelling employees to work more than six hours without a lunch break. It does not mandate the employees to take a lunch break. This is made abundantly clear by management's position that employees may in fact work through their shift without taking a lunch break if specifically approved by the supervisor.

Accordingly, I conclude that no written provision or policy exist in the National Agreement or LMOU regarding this issue. Because of the absence a written agreement over this subject matter, the past practice, herein, adds to the terms and conditions of employment, and may not be unilaterally changed.

Thus, it is concluded that management does have the managerial right to schedule employees' lunch breaks pursuant to Article 3 of the contract. The exercise of this right, however, must take into account all specific negotiated terms, nationally and locally, on this subject matter. This includes employee rights accrued through past practice. Once the past practice rights have attached, management may not unilaterally change those rights during the life of the agreement and shall continue until a new agreement is reached, unless specific contractual provisions permit management to make such changes. This conclusion shall be applied to the past practice herein.

It is unnecessary to discuss whether the “new “ rule requiring employees to take lunch break is reasonable in light of management’s intended objective, efficiency. It is suffice to conclude that the new rule is unreasonable because it alters a past practice concerning a term and condition of employment. Although it is noted that the achievement of the stated objective by changing the past practice is refuted by the supervisor in his written statement because the new rule caused the opposite effect by delaying the mail dispatch.

Prohibition against unilateral changes

As discussed above, management has the exclusive right to schedule employees’ lunch breaks. However, once a term and condition of employment is established by written agreement or by past practice, Article 5 prohibits the Xxx from making unilateral changes to those terms and conditions of employment.

The treatises provided by the parties provided different analysis to determine whether a past practice can be unilaterally changed without violating the contract. One analysis is based on whether the past practice concern a major or minor term and condition of employment; another analysis is based on weighing the employee benefit to management’s operation function. I have considered both analyses and conclude that they are not inconsistent with the test I, as well as many other arbitrators, have adopted in determining whether a unilateral change violates a contract.

I do not specifically adopt those analyses, as both tests are open to subjective interpretations by arbitrators. In comparison, the test that I have adopted is a bright line test depending only on the conclusion of whether the change involved a term and condition of employment. Most terms and conditions of employment have been identified and categorized as such by arbitrators and various courts. Invariably, scheduling of employees lunch breaks are universally considered terms and conditions of employment. Accordingly, any unilateral changes during the life of the agreement to specific contractual provisions or provisions established by past practice dealing with

scheduling and lunch breaks violate Article 5 of the contract, unless the agreement specifically permits management to do otherwise. Inasmuch as no provisions in the National Agreement or LMOU permits management from changing past practice pursuant to its managerial rights, management violated Article 5 herein.

Conclusions and Remedy

Based on the above, I conclude that an enforceable past practice existed at the Xxx, tour 3, that allowed employees to skip their lunch break without obtaining approval from their supervisor. This practice is a term and condition of employment that is subject to bargaining by the parties. Management unilaterally changed the practice. This conduct violated Article 5 of the National Agreement prohibition against unilateral changes.

The Xxx is instructed to immediately reinstate the above described past practice. The past practice shall continue in full force and effect until the parties negotiate a new agreement at the appropriate time in accordance with the National Agreement process of providing local Union and management an opportunity to negotiate LMOUs. If an agreement on the past practice is reached, the issue is resolved. If no agreement is reached, then the past practice shall cease upon proper notice to the Union if the Xxx exercises it managerial rights under Article 3 to discontinue the past practice.

Award

The grievance is sustained.